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12 UNITED STATES DISTRICT COURT
13 DISTRICT OF NEVADA

14 ZANE M. FLOYD,

15 Plaintiff,

16 v.

17 CHARLES DANIELS, Director, Nevada
Department of Corrections, et al.,

18 Defendants.
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Case No. 3:21-cv-00176-RFB-CLB

**MOTION FOR STAY OF
EXECUTION**

(DEATH PENALTY CASE)

**EXECUTION WARRANT SOUGHT
BY THE STATE FOR THE WEEK
OF JUNE 7, 2021**

1 DATED this 21st day of April, 2021.

2 Respectfully submitted
3 RENE L. VALLADARES
4 Federal Public Defender

5 /s/ David Anthony
6 DAVID ANTHONY
7 Assistant Federal Public Defender

8 /s/ Brad D. Levenson
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11 /s/ Timothy R. Payne
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**PLAINTIFF'S APPLICATION
FOR STAY OF EXECUTION AND BRIEF IN SUPPORT**

Plaintiff Zane Floyd respectfully applies to this Court for an Order staying his execution by lethal injection which the State of Nevada seeks to carry out during the week commencing on the 7th day of June, 2021. *See* Ex. 13 (state's motion). Floyd has previously filed a Complaint challenging the constitutionality of Nevada's lethal injection execution protocol and its intent to execute him by sequentially administering midazolam, fentanyl, and cisatracurium. ECF No. 2. This three-drug lethal injection procedure is the manner of execution authorized by Nevada Department of Correction's (NDOC's) Execution Manual, effective June 11, 2018, which, to the best of Floyd's knowledge, represents Nevada's current execution protocol. Along with his Complaint, Floyd also filed a motion for preliminary injunction and temporary restraining order. ECF Nos. 5 and 6.

This Application is being presented to this Court because it is necessary that Floyd's execution be stayed to allow him the opportunity to litigate and appeal, if necessary, his constitutional claims as set forth in his Complaint. In the event the State asserts an intent to utilize a method of execution different than that set forth in the NDOC's June 11, 2018 execution protocol, it is necessary that Floyd's execution be stayed to allow him the opportunity to adequately review, ascertain, and litigate any claims regarding the constitutionality or lawfulness of any new proposed method, *i.e.* "execution protocol," proposed by the State for killing Floyd.

Floyd is aware of various reports in the media suggesting that the Nevada Department of Corrections (NDOC) does not possess the three drugs required under

1 its June 11, 2018 execution protocol for carrying out Floyd's execution. For this
2 reason, Floyd has also filed a Motion for Disclosure of the State of Nevada's
3 Intended Method of Execution. ECF No. 7. As presented in that motion, if the State
4 does plan to use some other method of execution, it has yet to inform Floyd of the
5 most basic information regarding its intentions. Floyd presently has no knowledge,
6 for instance, of what the State's new proposed method of execution would be;
7 whether, if the method is lethal injection, the new protocol calls for use of drugs
8 different than those under the current protocol; if new drugs are to be used, what
9 they are and who manufactured them; if new drugs are to be used, how they are to
10 be administered, and in what sequence and dosages; whether there is a new written
11 execution protocol for the proposed method; whether the new written execution
12 protocol, if any, has been appropriately reviewed, approved by signature, and given
13 an effective date; whether the new execution method was developed in conformance
14 with state law (e.g., whether the NDOC Director properly consulted with the State
15 of Nevada's Chief Medical Officer in selecting the drug or combination of drugs to be
16 used in the execution, *see* Nev. Rev. Stat. § 176.355(2)(b); and whether the new
17 protocol provides for the basic equipment, medical staff, staff training and other
18 necessary safeguards to reasonably ensure a humane and constitutional execution
19 of Floyd.

20 Furthermore, even were the State to disclose some of this basic information
21 and identify any new drugs to be used in Floyd's lethal injection execution, he
22 should still be entitled to a stay of execution and the opportunity to conduct
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1 discovery and present expert testimony at an evidentiary hearing to challenge the
2 change in execution protocol. *See, e.g., Pavatt v. Jones*, 627 F.3d 1336, 1338–40
3 (10th Cir. 2010); *see also Nelson v. Campbell*, 541 U.S. 637, 639 (2004) (concluding
4 that 42 U.S.C. § 1983 was “an appropriate vehicle for petitioner’s Eighth
5 Amendment claim seeking a temporary stay” based on altered execution protocols
6 that could violate constitutional rights).

7 I. LEGAL STANDARD FOR STAY OF EXECUTION

8 The same factors applicable to injunctive relief apply to a request for a stay of
9 execution. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Additionally, in considering
10 whether to grant a stay of execution, the Court may also consider whether an
11 inmate has delayed unnecessarily in bringing a claim. *Nelson v. Campbell*, 541 U.S.
12 637, 649–50 (2004). Granting a stay of execution along with a preliminary
13 injunction is proper. *See Nken v. Holder*, 556 U.S. 418, 428–29 (2009)
14 (distinguishing between a stay, which suspends the source of authority to act and
15 “operates upon the judicial proceeding itself,” and an injunction, which prohibits
16 persons from taking any action because it “is directed at someone, and governs that
17 party’s conduct”).

18 A. Floyd is entitled to a stay of execution.

19 A stay is warranted when a condemned inmate seeks additional time to raise
20 and litigate his claims beyond what his scheduled execution date allows. *See*
21 *Martiniano v. Bell*, 454 F.3d 616, 616–17 (6th Cir. 2006). There are four factors this
22 Court must consider when granting a motion for stay of execution. These are: (1) the
23 likelihood Floyd will succeed on the merits; (2) the possibility of irreparable injury

1 to Floyd if the stay application is not granted; (3) the possibility of injury to other
2 parties; and (4) the public interest. *Bundy v. Wainwright*, 808 F.2d 1410, 1421
3 (11th Cir. 1987). Moreover, where a plaintiff seeking temporary injunctive relief has
4 adequately established irreparable harm and the balance of hardships weigh in his
5 favor, the probability-of-success requirement is relaxed: “where the ‘balance of
6 hardships . . . tips sharply towards the plaintiff,’ a plaintiff need only show ‘serious
7 questions going to the merits,’ rather than likelihood of success on the merits, to
8 warrant preliminary injunctive relief.” *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir.
9 2020) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th
10 Cir. 2011)); see also *Villanueva-Bustillos v. Marin*, 370 F. Supp. 3d 1083, 1087 (C.D.
11 Cal. 2018); *Anthony v. Texaco*, 803 F.2d 593 (10th Cir. 1986). These factors favor
12 entry of a stay in Floyd’s case.

13 As to the first factor, Nevada’s proposed lethal injection procedure is
14 unconstitutional under the Eighth Amendment. As set forth in detail in his
15 Complaint, the three-drug protocol proposed by Nevada is problematic on several
16 fronts. The first drug to be administered under the protocol is midazolam. There has
17 been an increasing concern in the scientific community that, in the context of
18 government-sponsored executions, midazolam not only fails to adequately
19 anesthetize a condemned inmate so as to render him insensate to pain caused by
20 administration of subsequent drugs, but also produces flash pulmonary edema
21 which in and of itself is painful as well as a burning sensation caused by the acidity
22 of the drug solution.

1 The second drug to be administered, fentanyl, is known to lack capacity to
2 block awareness in patients even when given in high dosages, and it is highly
3 experimental as a drug used in executions. Because it does not adequately block
4 awareness, use of this drug creates a risk that Floyd could be aware of his need to
5 breathe while he is being suffocated to death, which medical experts describe as a
6 horrific, torturous experience.

7 The third and final drug to be administered, cisatracurium, is a paralytic
8 drug. Nevada is the only state with a proposed lethal injection procedure calling for
9 a paralytic agent to be the final drug administered; nor has there ever been an
10 execution in the United States in which a paralytic was used as the final, killing
11 drug. Its use in Nevada would thus be wholly experimental. Further, it is
12 recognized that delivery of a paralytic agent to an inadequately anesthetized
13 individual would undoubtedly result in an unconstitutional risk of causing severe
14 pain and suffering. *See Baze v. Rees*, 553 U.S. 35, 53 (2008) (“It is uncontested that,
15 failing a proper dose of sodium thiopental that would render the prisoner
16 unconscious, there is a substantial, constitutionally unacceptable risk of suffocation
17 from the administration of [paralytic agent] pancuronium bromide and pain from
18 the injection of potassium chloride.”). Indeed, the only court (state or federal) to hold
19 an evidentiary hearing and address the constitutionality of Nevada’s proposed
20 lethal injection method of execution found it to be unconstitutional under the
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1 Eighth Amendment.¹ Floyd establishes a sufficient likelihood of success on the
2 merits.

3 The second factor, irreparable injury to Floyd, also weighs heavily in favor of
4 a stay. Floyd's execution under the present protocols is certainly irreversible. And
5 that execution, absent this Court's intervention, will cause unconstitutional pain
6 and suffering.

7 The third factor, the possibility of injury to other parties also weighs in
8 Floyd's favor. While the State will not be able to execute him immediately, they will
9 be able to do so once they establish a constitutional protocol. The delay will not be
10 significant and is very similar to the delays common to the process of execution as
11 capital cases are reviewed. On the other hand, the impending harm to Floyd is
12 extreme.

13 Further, the fourth factor, the public interest, is similar in this case to the
14 injury factor and both weigh in favor of a stay. Both the public and Floyd have a
15 strong interest in humane executions.

18
19 ¹ The state court found the State's use of a paralytic drug in the execution
20 presented an unconstitutional substantial risk of injury and an objectively
21 intolerable risk of harm in violation of the Eighth Amendment and the
22 corresponding provision of the Nevada Constitution. ECF No. 4-7 at 2-18 (December
23 2017 Findings of Fact, Conclusions of Law, and Order Enjoining the Nevada
Department of Corrections From Using a Paralytic Drug in the Execution of
Petitioner). On appeal, the Nevada Supreme Court reversed the district court's
order, but only on procedural grounds. *See Nevada Dep't of Corr. v. Eighth Jud.
Dist. Ct. in & for Cty. of Clark*, 417 P.3d 1117, 2018 WL 2272873 (Nev. 2018)
(unpublished table disposition).

B. This Court is also authorized to grant a stay under the All Writs Act.

In addition to the Court's power to grant temporary injunctive relief, this Court is empowered to grant the requested stay of execution pursuant to 28 U. S.C. § 1651(a), the All Writs Act, which provides:

The Supreme Court and all courts established by Acts of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The “all writs” authority of Section 1651 “extends to potential jurisdiction of a court where an appeal is not then pending but may be later perfected,” and is “not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal.” *Federal Trade Comm'n v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (citations omitted); *Harris v. Nelson*, 394 U.S. 286, 299–300 (1969). In *Harris*, the Supreme Court stated:

[T]he habeas corpus jurisdiction and the duty to exercise it being present, the court may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651. This statute had served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve the rational ends of the law' It has been recognized that the courts may rely upon this statute in issuing orders appropriate to assist them in conducting factual inquiries In *Price v. Johnson* this court held explicitly that the purpose and function of the All Writs Act is to supply the courts with the instruments needed to perform their duty as prescribed by the Congress and the constitution provided only that such instruments are 'agreeable' to the usages and principles of law, extended to habeas corpus.

Id. at 300 (citation omitted).

1 Thus, this Court is also authorized to entertain this application and grant the
2 emergency stay request under § 1651. The Eleventh Circuit notes that § 1651
3 “authorizes [a] court to issue a stay to preserve issues for judicial review.” *Messer v.*
4 *Kemp*, 831 F.2d 946, 957 (11th Cir. 1987). That is precisely what Floyd asks this
5 Court to do. This Court will irrevocably lose its jurisdiction to consider the federal
6 claims that entitle Floyd to relief if the State is allowed to execute him before
7 federal review can occur.

8 Here, the need for a stay to preserve this Court's jurisdiction to orderly
9 review Floyd's claims is particularly compelling. The primary basis for Floyd's
10 requests for judicial relief arose just recently when informed the State had sought
11 entry of a warrant of execution and, presumably to use a similar lethal injection
12 procedure it had sought to use in 2017 in its effort to execute Scott Dozier, which
13 procedure was declared unconstitutional by the only Nevada court to address a
14 constitutional challenge to the protocol on the merits. *See n.1, supra*.

15 Many other courts, including the United States Supreme Court, have used
16 the All Writs Act to grant stay relief. *See Lenhard v. Wolff*, 443 U.S. 1306 (1979);
17 *Republican State Cent. Comm. v. Ripon Soc'y, Inc.*, 409 U.S. 1222 (1972). In
18 *Lenhard*, then Associate Justice Rehnquist, acting on behalf of the whole Court,
19 used the All Writs Act to continue a stay of execution, though he personally would
20 have voted to deny the stay if sitting as a member of the full court. 443 U.S. at 1312.
21 The Supreme Court's All Writs Act cases recognize that:

22 [p]rocedural instruments are means for achieving the
23 rational ends of law Unless appropriately confined by
 Congress, a federal court may avail itself of all auxiliary

1 writs as aids in the performance of its duties, when the use
2 of such historic aids is calculated in its sound judgment to
3 achieve the ends of justice entrusted to it.

4 *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

5 In *F.T.C. v. Dean Foods Co.*, 384 U.S. 597 (1966), the Supreme Court made
6 clear that a federal court may act under the All Writs Act to preserve its future
7 federal jurisdiction over a matter committed to it by statute. In *Dean Foods*, the
8 Court enjoined a company's merger and dissolution to preserve the court's future
9 jurisdiction under the Administrative Procedure Act, which grants the court of
10 appeals original jurisdiction to review final orders of federal administrative
11 agencies. Although this regulatory matter was pending before an administrative
12 agency and no federal court action formally had been initiated, the court of appeals
13 was nevertheless permitted under the All Writs Act to stay the dissolution of the
14 company pending invocation of its jurisdiction under the Administrative Procedure
15 Act. 384 U.S. at 603–05.

16 In the case of *In Re Application of President and Directors of Georgetown*
17 *College*, 331 F.2d 1000 (D.C. Cir. 1964), the district court issued an order under the
18 All Writs Act permitting nonconsensual blood transfusions. Recognizing that federal
19 jurisdiction does not depend on a comprehensive initial pleading, the Court
20 explicitly noted and excused defects in the form of the papers filed:

21 Though the papers may be irregular in form [counsel had
22 appeared in chambers with a proposed order, and filed no
23 other papers], in substance they perform the office of a
 complaint, indicating the nature of the matter in dispute,
 the grounds of jurisdiction, and the relief sought. Defects
 in the complaint are not fatal under the Rules, certainly
 where the deficiency is explained by lack of time or skill or
 the like. Even the lack of a complaint is not jurisdictional
 and ... when there has been no timely objection, a valid

1 judgment may properly be entered in such an informal
2 litigation.

3 *Id.* at 1001 n.2 (citations omitted).

4 The jurisdiction-preserving power of the All Writs Act has long been used by
5 the federal courts to stay the executions of state prisoners. The only question the
6 Court must address is whether the state prisoner is potentially eligible for federal
7 relief, regardless of whether the inmate filed a formal petition or validly invoked the
8 Court's jurisdiction to provide final relief. *See, e.g., Edwards v. New York*, 350 U.S.
9 490 (1956) (Harlan, J. in chambers) (despite "grave doubts, to say the least" as to
10 the presence of a substantial federal question, "this being a capital case I am
11 constrained to give petitioner a reasonable opportunity to petition for a writ of
12 certiorari"); *United States v. Shipp*, 203 U.S. 563, 573 (1906) (Holmes, J.) (even had
13 federal habeas jurisdiction been absent, federal stay of execution was proper, as was
14 contempt prosecution arising from lynching of habeas petitioner during stay; stay
15 was necessary for federal court to determine its own jurisdiction over action).

16 In *Adderly v. Wainwright*, 58 F.R.D. 389, 401 (M.D. Fla. 1972), the district
17 court relied on the All Writs Act to enter stays of execution of prisoners absent their
18 filing of individual habeas petitions where other prisoners sought to file a class
19 action on their behalf.

20 In holding that it had authority under the All Writs Act to apply Federal
21 Rule of Civil Procedure 23, by analogy, to a petition for a writ of habeas corpus, the
22 court held that it had been "appropriate, and hence in aid of its habeas corpus
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jurisdiction, that a writ issue allowing the petitioners to proceed in accordance with the provisions of Rule 23.” 46 F.R.D. at 99.

II. CONCLUSION

Accordingly, for all reasons provided above, Plaintiff Zane Floyd respectfully requests this Court stay his scheduled execution.

DATED this 21st day of April, 2021.

Respectfully submitted
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CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 21st day of April, 2021, a true and correct copy of the foregoing PLAINTIFF'S MOTION FOR STAY OF EXECUTION, was filed electronically with the United States District Court. Electronic service of the foregoing document shall be sent via email addressed as follows:

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